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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 04 122 50512 Office: CALIFORNIA SERVICE CENTER Date: FEB 02 2006

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

S Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences. The petitioner seeks employment as a practitioner of traditional Japanese acupuncture and moxibustion. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not discuss details of the petitioner's claim to qualify as an alien of exceptional ability in the sciences. Rather, the director determined that the petitioner, who holds a Ph.D. in acupuncture from American Liberty University, qualifies as a member of the professions holding an advanced degree. The distinction is moot to some extent, because both classifications derive from the same statutory provisions, but it appears that the petitioner's claim of exceptional ability has more merit than the director's unsolicited finding that the petitioner is a member of the professions holding an advanced degree.[1] The sole issue in the director's decision is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

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[1] A labor certification submitted on appeal indicates that no college education is necessary to qualify as an acupuncturist, and therefore the occupation does not meet the regulatory definition of a "profession" as set forth at 8 C.F.R. § 204.5(k)(2). If any issue would prevent a finding that the petitioner is an alien of exceptional ability in the sciences, it is uncertainty as to whether Japanese acupuncture and moxibustion can properly be called "sciences" rather than folk remedies whose efficacy remains in dispute, and which rely to some degree on supernatural principles such as yin, yang, and qi, the objective existence of which remains to be satisfactorily demonstrated.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services (CIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

In an introductory statement submitted with the initial filing of the petition on March 25, 2004, counsel states:

> Petitioner is an internationally renowned *traditional Japanese acupuncturist and moxibustion practitioner*, certified both in Japan and California.
>
> The style of Acupuncture the petitioner practices is rare in the United States. It is now considered by some a new approach in treating drug addiction and HIV patients, and has gained support from government agencies and medical field experts from abroad and here in San Francisco Bay Area. Not only have his treatments helped heal people, but he has also been teaching and passing down this art to others in California for the past year, making it possible for this rare form of acupuncture to develop and flourish in the United States. Allowing the petitioner to continue practicing and teaching this unique and specialized style

> of acupuncture in the United States would be an invaluable and crucial contribution to the United States in the area of "Alternative Medicine," specifically in complimenting [*sic*] the medical treatments and health care of drug addiction and HIV/AIDS patients in the United States. . . .
>
> Acupuncture is becoming increasingly accepted in the United States, as it is undisputed that acupuncture does work. Though, how it works is still uncertain. Allowing [the petitioner] to practice this specialized style of Japanese acupuncture, a derivative from the Chinese methods, would greatly assist and accelerate American medical researchers nationwide to gain a better understanding of the ancient art.

We note, here, that the record contains no evidence that the petitioner's work has attracted, or is likely to attract attention among "American medical researchers nationwide."

Counsel continues:

> Not only are the petitioner's skills in Japanese style acupuncture not widely available in the United States at this time, but his specialization in the treatment of drug addiction and HIV is also exceptionally rare and extremely important, given the widespread problems of drug addiction and epidemic levels of HIV in this country. [The petitioner's] methods of treatment would provide a new method of attack in our nation's war against drugs and AIDS. . . .
>
> Acupuncture does not cure **HIV infection**. Nobody is claiming that. However, many HIV-infected patients believe that acupuncture has helped them improve their overall energy, or deal with the side effects of antiviral medication. Others find that it helps ease the pain caused by neuropathy.

General arguments about the claimed benefits of Japanese acupuncture speak to the intrinsic merit of the field of endeavor, rather than establish that any one particular practitioner qualifies for a national interest waiver. Congress created no blanket waiver for Japanese-style acupuncturists, and therefore we cannot conclude that expertise in Japanese acupuncture is *prima facie* grounds for a national interest waiver. Specialized training is not a basis for approval of the waiver. *See Matter of New York State Dept. of Transportation*, n.7 at 221.

The petitioner submits copies of certificates showing that he is a qualified acupuncturist. The record shows that the petitioner has written articles in a Japanese-language magazine, but the petitioner has submitted translations only of what appear to be the titles of his articles (such as: "All illnesses are prevented and cured by gargling"). Also, the magazine is identified as "the monthly magazine for Japanese Reading in Northern California," indicating that the publication circulates only within a small geographic area rather than nationally. Materials in the record indicate that the petitioner works at Wan's Acupuncture Clinic and at Toshi Union Square Salon, both in San Francisco, California. [redacted] American College of Traditional Chinese Medicine (ACTCM), states: "the American College of Traditional Chinese Medicine intends to continue offering a faculty position to [the petitioner], a licensed acupuncturist, who supervises student interns at ACTCM Community Clinic." These activities all appear to be largely local in

scope, their effect and impact generally confined to the San Francisco area. Thus, work performed at a local clinic and the supervision of interns would not satisfy the "national scope" prong of the national interest test described in *Matter of New York State Dept. of Transportation.*

A brochure reproduced in the record indicates that the petitioner participated in the 5th International Congress on Ecology and Cancer, which took place in Okinawa, Japan in November 1999. The petitioner delivered a presentation on alternative medicine in Myanmar; the petitioner claims to have been "the first Japanese acupuncturist and moxacauterist" in that country. From the summary in the record, it appears that the petitioner's presentation was a general lecture and a description of his own work, rather than a report on original research. The record does not establish that, since 1999, the petitioner has produced research findings or other information for national or international dissemination.

Several letters accompany the petition. Some of these letters describe the petitioner's work in Myanmar from 1995 to 1998. Others discuss the petitioner's more recent work in California. One letter is from one of the petitioner's patients, describing his satisfaction with the petitioner's efforts; others are from various individuals in the San Francisco area, asserting that the petitioner provides valuable services as an acupuncturist and as a teacher. Overall, the letters essentially argue that the petitioner serves the national interest by virtue of being a trained acupuncturist.

On December 16, 2004, the director instructed the petitioner to submit additional evidence to explain why the petitioner stands prospectively to benefit the United States to a greater extent than other qualified acupuncturists. The director requested evidence to conform to the guidelines listed in *Matter of New York State Dept. of Transportation*, such as "evidence that the benefits of the alien's proposed employment will be **national** in scope" (director's emphasis), and to show that the petitioner's reputation and impact were not largely confined to the San Francisco area. In response, the petitioner has submitted four additional letters, all from witnesses in San Francisco except for one letter from a witness in Santa Monica. One of the witnesses, [redacted] devotes his letter to the petitioner's treatment of one patient. Whatever the petitioner may have accomplished for this one patient, such anecdotal reports do not confer national scope on the petitioner's endeavors, and the petitioner can hardly be expected to submit testimonials from dissatisfied clients.

Other witnesses attest to the petitioner's credentials but provide no specific information about how the petitioner's work is anything but local in scope. General assertions that the petitioner can benefit the country with his skills cannot suffice in this regard. [redacted] president of the Japan Acupuncture Association of California (JAAC), states "JAAC will offer [the petitioner] a permanent instructor position once he is granted legal permanent resident status." [redacted] also asserts that, because acupuncture is less expensive than hospital care for HIV/AIDS patients, the petitioner's work will result in "very significant" savings. The same argument could be made of any qualified acupuncturist, even accepting (for the sake of argument) the unproven assumption that monthly acupuncture treatments are capable of totally and effectively replacing hospital care for individuals with HIV/AIDS. This argument does not demonstrate that the activities of one acupuncturist have a nationally significant effect on health care costs.

The director denied the petition, stating that the petitioner had not shown why a standard job offer with labor certification would not suffice. The director determined that "it appears that the petitioner's work is national

in scope" because "[t]he petitioner has successfully worked/treated patients diagnosed with HIV/AIDS and with other critical conditions." The director did not explain why treatment of individual patients is national in scope. We quote, here, from the precedent decision:

> For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act.

Matter of New York State Dept. of Transportation, n. 3 at 217. The same logic applies here; whatever national interest may lie in health care as a whole, one practitioner's treatment of individual patients is too attenuated at the national level to meet the "national scope" criterion. We note that clinical physicians do not, as a general rule, qualify for the national interest waiver, even when practicing standard medical techniques that have withstood far more rigorous testing than acupuncture, moxibustion, and other "alternative" methods. Section 203(b)(2)(B)(ii) of the Act indicates that certain physicians qualify for the waiver provided that they practice in medically underserved areas. This clause would be redundant, if not outright restrictive, if physicians were already presumptively eligible for the waiver simply by virtue of being physicians. Surely the standard should not be lowered in the case of more controversial treatments that are not restricted to licensed graduates of accredited medical schools.

On appeal, the petitioner explains why he believes a waiver to be in order:

> I believe it serves the national interests for me to be self-employed, rather than an employee of an existing clinic or institute.
>
> As an employee in an Oriental Medicine school, my role is to serve the best interests of my employer, not the American public as a whole. . . . Because the ultimate goal is to prepare students for exams for exams that focus on the Chinese style, I am somewhat limited in my ability to teach and promote Japanese methods in an Oriental Medicine school.
>
> As far as employment in a clinic . . . my ability to teach traditional Japanese methods is also severely limited. In this context, I can only help individual patients; but I cannot spread the wisdom of Traditional Japanese Medicine to American people, which is my dream. Should my employment waiver be granted, I hope to establish an institute which will promote awareness and education of ancient Japanese healing wisdom in the United States.

At the time of filing, the petitioner did not state that he should receive a waiver so that he could be self-employed and establish his own institute. Rather, the materials submitted with the initial filing pointed to the petitioner's faculty position at ACTCM as evidence "that the petitioner will continue to work in the area of his expertise." Now, on appeal, the petitioner states that just such a faculty appointment is a hindrance to his work.

A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998). We cannot accept, on appeal, a rationale for the waiver that presumes conditions that differ significantly from those originally advanced at the time of filing.

Also, while an institute could conceivably have national impact, such an entity remains, at this point, an entirely hypothetical entity with, so far, no evidence of its viability or influence. There is no evidence that the petitioner has any past experience founding and maintaining schools of traditional Japanese medicine, and therefore the new assertion that the petitioner will serve the national interest in this way is entirely conjectural. We note the petitioner's claim to have been the first practitioner of traditional Japanese acupuncture in Myanmar, but such is clearly not the case in the United States, where not only are there other practitioners, but there is actually an association (JAAC) for such practitioners. Thus, the technique has already been introduced to the United States.

The petitioner has not shown that, after several years in the United States, he has significantly influenced the practice of Japanese acupuncture in this country, significantly furthered its acceptance, or published or otherwise shown that he is personally responsible for innovations that hold up to the same empirical scrutiny normally applied to "Western" medical innovations. We cannot find, based on the evidence of record, that the petitioner has persuasively demonstrated that it is in the national interest to waive the job offer requirement in this proceeding.

The petitioner states: "If, after reading this additional information, you still feel there is insufficient evidence to justify the waiver of a job offer in this case, then I would like to proceed without the waiver of a job offer. Attached please find my current labor certification." The petitioner submits an original Form ETA-750 labor certification, filed by Toshi Union Square Salon on March 27, 2002, and approved on December 1, 2004.

Pursuant to 8 C.F.R. § 204.5(k)(1), the intending U.S. employer must file a petition if the petition includes a job offer and approved labor certification. Here, the alien filed the petition on his own behalf. CIS can only consider the approved labor certification in the context of a new petition filed by Toshi Union Square Salon.

8 C.F.R. § 103.2(b)(4) states:

> *Submitting copies of documents.* Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, such as labor certifications, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, must be submitted in the original unless previously filed with the Service. When submission is required, expired Service documents must be submitted in the original, as must Service documents required to be annotated to indicate the decision. In all other instances, unless the relevant regulations or instructions specifically require that an original document be filed with an application or petition, an ordinary legible photocopy may be submitted. Original documents submitted when not required will remain a part of the record, even if the submission was not required.

Here, the petitioner has submitted the original labor certification on appeal, and therefore Toshi Union Square Salon is not in possession of the original document. If Toshi Union Square Salon chooses to file a petition on the alien's behalf, the petition should include a copy of the labor certification and an explanation that the original labor certification is contained within the record of proceeding for WAC-04-122-50512. Such a petition should also seek a classification that is consistent with the degree of education and experience required (or, in this instance, not required) on the labor certification.

As is clear from a plain reading of the statute, it was not the intent of Congress that exceptional ability or an advanced degree should automatically exempt an alien from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given occupation, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition (seeking an applicable classification) by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.